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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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EMERSON ELECTRIC CO., :  
Plaintiff : 16-CV-1390(PKC)

-against- :  
United States Courthouse  
Brooklyn, New York

CHARLES S. HOLMES and :  
ASSET MANAGEMENT ASSOCIATES :  
OF NEW YORK, INC. :  
Defendant. : May 18, 2021  
2:00 p.m.

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TRANSCRIPT OF PRETRIAL CONFERENCE VIA VIDEO  
BEFORE THE HONORABLE PAMELA K. CHEN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: SIMON LESSER PC  
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New York, NY 10017  
BY: LEONARD F. LESSER, ESQ.

For the Defendants: MINTZ & GOLD LLP  
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New York, NY 10016  
BY: BARRY M. KAZAN, ESQ.  
CARLI M. ABERLE, ESQ.

Court Reporter: Andronikh M. Barna  
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Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.

1           THE CLERK: Civil cause for a pretrial conference.  
2 Docket 16-CV-1390.

3           Before asking the parties to state their  
4 appearances, I would like to note the following. Persons  
5 granted remote access to proceedings are reminded of the  
6 general prohibition against photographing, recording and  
7 rebroadcasting of court proceedings. Violation of these  
8 prohibitions may result in sanctions, including removal of  
9 court-issued media credentials, restricted entry to future  
10 hearings, denial of entry to future hearings or any other  
11 sanctions deemed necessary by the Court.

12           Will the parties please state their appearances for  
13 the record, starting with plaintiff.

14           MR. LESSER: Good afternoon, Your Honor.  
15           Leonard Lesser of Simon Lesser, P.C. for the  
16 plaintiff, Emerson Electric Company.

17           THE COURT: Good afternoon.

18           MR. KAZAN: Good afternoon, Your Honor.

19           Barry Kazan of Mintz & Gold for Defendant Charlie  
20 Holmes. With me is Carli Aberle.

21           We've been advised to file a notice of appearance  
22 for Ms. Aberle, which we will take care of, but she would not  
23 have been able to do it before last week, as she just was  
24 admitted to the Eastern District of New York.

25           THE COURT: Congratulations.

1 All right. Good afternoon to both of you.

2 So we are here for an initial pretrial conference in  
3 anticipation of trial in this matter. What we are going to do  
4 is go over the joint pretrial order that has been proposed by  
5 the parties to address issues that can possibly be resolved  
6 today or at least should be discussed initially. I also am  
7 going to explain more about the additional briefing that I  
8 think needs to be done before trial itself. But we will set a  
9 date for trial. Obviously, it is going to be very far out,  
10 given our current situation, and then we will set dates  
11 related to pretrial briefing that has to be done before we  
12 start trial.

13 So hopefully you have in front of you the joint  
14 pretrial order. I want to start out by clarifying a couple of  
15 the defenses that Mr. Kazan -- is it Kazan? I'm sorry.  
16 Mr. Kazan, that you have put in the joint pretrial order.

17 One of the things you argue is that the plaintiff's  
18 Section 276 claim is barred by the six-year statute of  
19 limitations. I guess I am wondering why this was not the  
20 subject of -- or should not be the subject of a motion as  
21 opposed to something that is tried to the jury. Explain to me  
22 more what it is you think this defense is and what facts it  
23 relies upon, if any.

24 MR. KAZAN: The defense is that the specific  
25 conveyances that would have been attacked would have been

1 dealing with conveyances that occurred more than six years  
2 prior to the commencement of this action and there has been  
3 some -- I would say a little bit of confusion on our part as  
4 to a couple of the conveyances that were brought up at various  
5 points. But there's also, I believe, a discovery rule that  
6 does potentially impact the statute of limitations defense,  
7 which I believe Mr. Lesser -- and he can certainly speak for  
8 Emerson -- has suggested that would fall under the two-year  
9 discovery rule. So I believe we made the decision not to move  
10 for summary judgment on that basis because the question would  
11 be, one, the timing of the specific conveyances that are being  
12 opposed, one of which -- or several of which may have occurred  
13 prior to six years. And then, two, certainly on the issue of  
14 the discovery rule, I am not sure that's an issue that would  
15 have been able to be resolved on summary judgment because I  
16 believe we would have had a different version of the facts.

17 THE COURT: Well, the transactions, Mr. Lesser, that  
18 are the subject of -- or I guess conveyances that are the  
19 subject of this lawsuit, what is the time frame involved,  
20 according to your theory of the case?

21 MR. LESSER: The transfers that are the subject of  
22 the fraudulent conveyance claims all occurred during the  
23 underlying litigation, generally 2008 through 2010, but like  
24 Mr. Kazan just said, there is the discovery rule. We didn't  
25 get disclosure of these transfers until after the AMA

1 bankruptcy proceeding was dismissed and Mr. Holmes responded  
2 to the post judgment discovery. Remember that after the first  
3 judgment was docketed, I served post judgment discovery  
4 requests and information subpoenas, restraining orders, you  
5 know, all the typical post judgment discovery devices to find  
6 the assets. And shortly thereafter, shortly after those were  
7 served, AMA filed for involuntary bankruptcy in the Eastern  
8 District -- in New Jersey and then it went through the  
9 procedural motions to bring it to the Eastern District of  
10 New York before Chief Bankruptcy Judge Carla Craig, who  
11 ultimately dismissed the bankruptcy proceeding. And we  
12 didn't -- and then once the stay was lifted, then Mr. Kazan,  
13 on behalf of Mr. Holmes, started responding to the post  
14 judgment discovery all well within two years of the filing of  
15 the complaint. So I don't think there really is any issue on  
16 that. We didn't have access to the AMA bank records in  
17 connection with the underlying litigation, so we didn't see  
18 the money trail and all the conveyances until after we got  
19 that disclosure, which was within the two years of the filing  
20 of the complaint.

21 THE COURT: Okay. So it does seem to me that at  
22 trial there is going to be some evidence produced regarding  
23 the actual discovery of these allegedly fraudulent  
24 conveyances. That is going to be necessary for the plaintiff  
25 in order to defeat this statute of limitations defense.

1           Is that fair to say, Mr. Lesser?

2           MR. LESSER: I would say I really don't think  
3 there's a legitimate dispute as to when we first got discovery  
4 of the fraudulent conveyances and the transfers. I'm happy to  
5 work through that with Mr. Kazan. I really don't see how  
6 there really could be any legitimate dispute as to when those  
7 materials were first produced which postdated the bankruptcy  
8 proceeding being dismissed, so I'm hoping maybe he and I can  
9 work that out. Otherwise, I mean, it's his burden of proof on  
10 the affirmative defense of statute of limitations and I'll  
11 just present, you know, an opposition, his letters to me with  
12 the disclosures and when I can come pick up the boxes of  
13 documents. I mean, I don't really think this should be  
14 something that's in dispute. I'm hoping that we can work it  
15 out.

16           THE COURT: Mr. Kazan, what do you say to that? Are  
17 there facts that really need to be found by a jury?

18           MR. KAZAN: At this moment, Your Honor, I think  
19 there are. I don't think it's simply the question of when the  
20 actual documents were produced to Mr. Lesser. For example,  
21 one of the conveyances that are raised here is the transfer  
22 from Mr. Holmes -- Asset Management Associates acquired CS --  
23 the company CSI. One of the transactions that's noted in your  
24 opinion as been raised in Mr. Lesser's expert report is that  
25 transfer from Asset Management Associates to Mr. Holmes as a

1 transfer. So in addition, there are issues that I think we  
2 intend to raise with respect to the filing of the bankruptcy,  
3 both in terms of the timing of the bankruptcy as well as  
4 Emerson's decisions within the bankruptcy that go to the  
5 equitable estoppel defenses such that it's likely that these  
6 issues will still, you know, arise.

7 But certainly Mr. Lesser and I -- and hopefully  
8 he'll agree with this statement -- we've been fairly  
9 cooperative in terms of timing, deadlines, and trying to work  
10 issues out. And we have discussed the fact that we do want to  
11 try to narrow some of this down, you know, in terms of the  
12 documents and potential testimony and, you know, objections.  
13 And so, you know, understanding that we may, due to the  
14 Court's schedule, have the time to do some of that, I would  
15 intend to, you know, engage in that exercise. So I won't  
16 foreclose it, but I do think it's a little broader than what  
17 Mr. Lesser has said.

18 MR. KAZAN: I'm happy, Your Honor, to just briefly  
19 respond.

20 The only thing I would say is, in connection with  
21 the transfer of CSI to Mr. Holmes which took place after the  
22 closing, two points on that.

23 One, we didn't get documentation regarding that  
24 transfer until discovery in this case in 2017.

25 And two, that transfer is not the subject in and of

1     itself of a fraudulent conveyance claim. The transfer will be  
2     evidence submitted in connection with the alter-ego liability  
3     component of the claim, but it is not part of the discrete  
4     fraudulent conveyance claims that we're pursuing. So I really  
5     don't see how that raise -- you know, impacts the alleged  
6     statute of limitations defense on the fraudulent conveyance  
7     claims.

8             And with respect to the bankruptcy and actions in  
9     the bankruptcy, I mean, I don't see how that impacts statute  
10    of limitations. There was a bankruptcy that was filed and  
11    ultimately it was dismissed on Emerson's motion. Emerson  
12    acted as aggressively as possible to get the bankruptcy  
13    dismissed so that the stay could be lifted so that we could  
14    get the discovery that then led to the information regarding  
15    the fraudulent transfers that we did ultimately include in the  
16    complaint that was filed in 2016.

17            So those are my brief responses. I am hoping that  
18    Mr. Kazan and I can confer about that. I think that there  
19    really shouldn't be an issue with respect to those discrete  
20    matters.

21            THE COURT: All right. Well, I mean, I will leave  
22    it to the parties to discuss this further to see if you can  
23    come to some resolution, though it sounds like the plaintiff's  
24    idea of a resolution is that this defense goes away because  
25    there is no factual predicate for it, whereas it does not



1 sound like Mr. Kazan agrees with that. So I am not sure you  
2 will be able to negotiate the affirmative defense away.

3 I think though the question becomes whether or not  
4 there is any potential evidence that the defense could bring  
5 to bear on or support this affirmative defense, as it will  
6 have to do at trial, and then it may be a matter of a motion  
7 in limine I guess by the plaintiff to preclude any argument  
8 with respect to an affirmative defense based on the statute of  
9 limitations if you think there is no evidence that would  
10 support that.

11 MR. LESSER: And that's exactly what I would like to  
12 do. Maybe at the very least, the confer -- meet and confer  
13 that I do with Mr. Kazan can isolate at least some of the  
14 factual allegations that support this defense because it's  
15 going to be the defense's burden of proof on that. And maybe  
16 just like you said, Your Honor, I'd present a motion in limine  
17 so we can limit the jury's time on that matter and you could  
18 make a ruling as a matter of law on anything that's  
19 appropriate with respect to the defense.

20 THE COURT: Right. I think if you folks cannot work  
21 it out and if the defense still wants to pursue this statute  
22 of limitations argument and the plaintiff thinks there is no  
23 basis for doing so, that will have to be resolved via motion  
24 in limine, or at least subject to one if it does not get  
25 resolved that way.

1           The second issue I wanted to raise with the defense  
2 is this allusion to equitable reasons under the *Brunswick*  
3 defense as a means of defeating the 276 claim. I just want to  
4 understand, what exactly does that refer to? And again, what  
5 would it mean for the evidentiary presentation by the defense  
6 or I guess on cross of the plaintiff's case?

7           MR. KAZAN: Thank you, Your Honor.

8           The issue with the equitable defense -- and, you  
9 know, it has been referred to as the *Brunswick* doctrine by us,  
10 you know, relying on that case, but it really just boils down  
11 to an equitable estoppel argument that there are certain  
12 indicia by Emerson's conduct that should preclude it from  
13 seeking to recover from Mr. Holmes. And so those issues are  
14 such that Mr. Holmes has testified, and Mr. Switzer, who is a  
15 representative of Emerson, have testified as to what the  
16 parties' intentions were at the time of the AMA contract and  
17 whether Mr. Holmes's individual liability was ever  
18 contemplated under that agreement under facts such as these,  
19 given the fact that AMA -- and sort of goes back to the same  
20 issue. AMA -- our position was that AMA could not hold CSI as  
21 an S-corp holding another corporation because of certain tax  
22 rules that would have endangered the S-corp status, that  
23 Mr. Holmes had made Emerson aware of that and that, as a  
24 result, the company ultimately was freestanding as CSI and  
25 Emerson and CSI engaged in a course of conduct over years

1 where Emerson knew that they were dealing with CSI.

2 And so there's a lot to -- you know, there may be a  
3 lot to unpack there, you know, and obviously we'll attempt to  
4 streamline the presentation for the jury so that they can  
5 understand it, but effectively it's this idea that the defense  
6 should preclude Emerson from recovering, especially in an area  
7 where you're arguing an intent to defraud, when Mr. Holmes's  
8 testimony is going to be that everyone understood what this  
9 deal was and everyone understood what the exposure was going  
10 to be, in addition to a couple of contractual provisions that  
11 in our view potentially limit recoveries, which we don't know  
12 what the jury may ultimately find, you know, which is why we  
13 did not move for summary judgment on that, as well as the  
14 nature of third-party liabilities within the contract.

15 THE COURT: Did you want to say anything about that,  
16 Mr. Lesser?

17 MR. LESSER: Oh, certainly.

18 So this equitable defense -- and I believe your  
19 decision issued last August, Your Honor, made clear that  
20 whether it's pleaded as the equitable estoppel or the  
21 equitable reasons, the *Brunswick* reasons, it's still the  
22 essence, this equitable estoppel defense which is predicated  
23 on the *Brunswick* decision and the allegation that they're --  
24 you know, this entity, AMA, is allegedly like the entity,  
25 subject entity in *Brunswick* was some sort of shell, not a real

1 company and, you know, we knew that going in, that kind of  
2 thing. I mean, we'll address those obviously as it pertains  
3 to the equitable claim for alter-ego liability.

4 As to the legal claim of fraudulent conveyance, the  
5 defense has no application as a matter of law. It's an  
6 equitable defense to alter-ego liability. It is not a defense  
7 to a fraudulent conveyance claim because the fraudulent  
8 conveyance claims obviously flow not from whatever the  
9 parties' statements and course of dealing was in the  
10 underlying transaction; the fraudulent conveyance claims flow  
11 from the transfers of money from the judgment debtor to  
12 Mr. Holmes. And there's no case that applies a  
13 *Brunswick*-style equitable estoppel defense to alter-ego  
14 liability to add a fraudulent conveyance claim. And that's  
15 the point. While the equitable claim of alter-ego liability  
16 relies in part on the fraudulent transfers as a function of  
17 the wrongs component of alter-ego liability, the standalone  
18 claims of constructive and intentional fraudulent conveyances  
19 is not subject to this *Brunswick* defense and that's pretty  
20 clear.

21 And if we need to, you know, further brief that in  
22 the motion in limine, we will do that, Your Honor.

23 THE COURT: So it seems that you acknowledge that  
24 there may be some applicability of this *Brunswick* defense to  
25 the equitable claim of piercing the -- or rather of the alter

1 ego aspect of your claims against Mr. Holmes, but you are  
2 saying it has no applicability to the Section 276 liability  
3 that you are claiming here; in other words, the fraudulent  
4 conveyance liability? Is that --

5 MR. LESSER: That's correct.

6 THE COURT: Okay.

7 MR. LESSER: That's correct.

8 And, I mean, we briefed the issue as to why I don't  
9 think the equitable estoppel applies to the alter-ego  
10 liability. Your Honor said they're issues of fact, that's  
11 fine. But that's separate and discrete from the fraudulent  
12 conveyance claims, one of them being the 276 intentional  
13 fraudulent conveyance claim.

14 THE COURT: So, Mr. Kazan, how are you intending to  
15 argue this? Were you intending to argue the *Brunswick* defense  
16 only in connection with the alter-ego liability claim or are  
17 you going to argue it as to the Section 276 claim in general?

18 MR. KAZAN: We intended to argue both, Your Honor.  
19 I know the issue is briefed. I don't think Your Honor -- I do  
20 think it was addressed under 273-a.

21 THE COURT: Right.

22 MR. KAZAN: But I don't think it was addressed under  
23 276. Obviously, you know, when you're talking about intent to  
24 defraud and you're arguing that the other side didn't rely on  
25 these situations, it appears that it would be relevant for

1 that decision whether it's characterized as a true affirmative  
2 defense or whether it's characterized as evidence of a lack of  
3 intent that meets 276. Because 276 is an intentional statute.  
4 273, you know, effectively is a strict liability statute in  
5 this context. The context being that shareholder loans,  
6 repayments under the version of the -- I want to call it the  
7 uniform transaction under 273-a that existed at the time  
8 essentially said, you know, an insider cannot get the benefit  
9 of a transferee in good faith. The issue with 276 is, because  
10 it's an intent to defraud, we believe we can apply it. And we  
11 did cite cases in the underlying briefing, you know, where,  
12 for example, even Magistrate Locke was dealing with a case  
13 dealing with equitable defense as to legal claims. And so I  
14 know that's Ms. Emerson's position in this case, but I don't  
15 know that it's settled such that it's not -- that it couldn't  
16 be presented to the jury in some fashion.

17 THE COURT: Well, I am looking at that portion of  
18 the decision where I addressed this *Brunswick* defense and  
19 unless I was mistaken at the time I issued the decision, I  
20 characterize Holmes's affirmative defense as the plaintiff  
21 should be equitably estopped from piercing AMA's corporate  
22 veil because when plaintiff contracted with defendants, it  
23 knew that AMA was effectively a dummy corporation that Holmes  
24 had created solely as a vehicle to carry out the deal and to  
25 shield Holmes from personal liability. So unless I

1 mischaracterized the defense's argument, it seemed to me that  
2 you argued, at least in the context of the summary judgment  
3 motion, this *Brunswick* defense exclusively or at least focused  
4 it very narrowly on the alter ego or piercing the corporate  
5 veil issue because it relates -- it seems to me the case  
6 itself relates to this notion of piercing the corporate veil  
7 and then the defendant's personal liability.

8           So I think what is going to have to happen here is  
9 that the plaintiff is going to have to file a motion in limine  
10 if, Mr. Lesser, you want to preclude the defense from arguing  
11 more generally that the Section 276 claim or any liability  
12 under Section 276 can be defeated by this *Brunswick* defense,  
13 an equitable defense.

14           Now, maybe there is no daylight between those two  
15 issues -- I just do not remember all that well -- and whether  
16 or not Mr. Holmes's personal liability is really the -- you  
17 know, would answer the question of Section 276 liability or  
18 some, you know, fraudulent conveyance under 276.

19           But, Mr. Lesser, if you think that for some reason  
20 the defense should not be allowed to argue this beyond being a  
21 defense to the alter-ego argument or liability of Mr. Holmes,  
22 you should put that in a motion in limine so that we could  
23 resolve that before trial and, you know, decide what -- so I  
24 can decide whether or not that argument can even be made to  
25 the jury.

1 MR. LESSER: Yeah, I think that's fine and I'm happy  
2 to do that.

3 I would just briefly respond that the whole notion  
4 of the equitable estoppel defense to alter-ego liability  
5 articulated in *Brunswick* was exactly how you framed it in your  
6 decision, Judge, which is an equitable theory based upon the  
7 alleged disclosure and knowledge of a purported dummy  
8 corporation being used as a vehicle for an acquisition as  
9 opposed to it being something more than that. We addressed  
10 that issue. That's fine, I can readdress it.

11 But with respect to the fraudulent -- intention of  
12 fraudulent conveyance claim, what I don't think Mr. Kazan  
13 correctly characterized was that with respect to a 276 claim,  
14 it's not like you present evidence that there was an  
15 intentional fraud committed as a result of the fraudulent  
16 transfers, you present evidence to the badges of fraud, right?

17 THE COURT: Right.

18 MR. LESSER: And if you have multiple badges of  
19 fraud and those badges of fraud are the close relationship  
20 between the parties to the con- -- acting in the normal course  
21 of a transaction and the inadequacy of consideration, things  
22 like that. If there are multiple badges, then there is clear  
23 and convincing evidence of actual intent. So I don't even see  
24 how the concepts that the *Brunswick* court is addressing  
25 vis-a-vis allegations that the corporate acquirer was a dummy,



1 how that would even apply to post acquisition fraudulent  
2 transfers and the allegations that they were intentional based  
3 upon the badges of fraud for those post acquisition transfers.

4 And that's the point. And I'm happy to address that  
5 in a motion in limine to the extent that the Court feels that  
6 it should be addressed, which I do. I think that it should be  
7 pulled away from a jury so that you can look at that legal  
8 issue and see how that defense should be applied to the extent  
9 that the defense presents its burden -- you know, meets his  
10 burden of proof to establish it.

11 THE COURT: Well, and one thing to consider with  
12 respect to these affirmative defenses, and I do not know the  
13 answer to this, is that oftentimes what will happen is the  
14 jury has to make certain findings of fact that are set forth  
15 in a special verdict sheet and then I would make a legal  
16 determination based on those findings of fact about the  
17 applicability of a defense. That obviously arises in  
18 different context. I do not know if that is the proper way of  
19 handling these two affirmative defenses, the statute of  
20 limitations as well as the equitable defense as to alter ego,  
21 but that is something that the parties will have to sort of  
22 apprise me of or argue about if there is disagreement.

23 But I do want to say --

24 MR. LESSER: Thank you.

25 THE COURT: Hang on.

1 I do want to say, Mr. Kazan, that at least right now  
2 all I found in the summary judgment decision was that there  
3 were issues of fact about what alter-ego theory that the  
4 plaintiff is pursuing, but I do not think I resolved it and I  
5 do not think it was added to the fact that it could be a  
6 defense to the 276 claim. And I think in part, for the  
7 reasons that Mr. Lesser says, that it is -- I do not think the  
8 original defense was intended to do that and I am not sure  
9 that it is a match between the facts that would give rise to  
10 the defense and those that would defeat a 276 claim.

11 But like I said, I think the plaintiff should maybe  
12 articulate that in a motion in limine.

13 Mr. Lesser, you do not have to reargue the point  
14 about the applicability as to the alter ego. Obviously, that  
15 issue possibly can be argued to the jury. Although, if you  
16 think the more proper way to deal with it is for me to make  
17 that determination posttrial, facts found by the jury, then  
18 you can make that argument as well.

19 MR. LESSER: And I was just going to suggest that  
20 very thing, Your Honor, especially given the fact the  
21 alter-ego claim is an equitable -- it's a claim that has to be  
22 crafted and that it is the proper way in which it will claim  
23 the sheet which will have factual determinations for the trier  
24 of facts that then you as the court of equity will then rule  
25 upon in a decision based upon the facts found by the fact

1 finder.

2 THE COURT: Right. I think that makes sense. That  
3 may not be true of the statute of limitations issue, but --

4 MR. LESSER: Correct.

5 THE COURT: But that would be subject to a different  
6 briefing --

7 MR. LESSER: Yes.

8 THE COURT: -- at any rate because of the reasons  
9 that you said earlier, Mr. Lesser, that there are no facts  
10 that you think the jury can find or would find that would  
11 support an affirmative defense.

12 Okay. Turning to page 10 of the joint pretrial  
13 order, both sides are requesting a jury trial. I alluded to  
14 this earlier that as --

15 (Audio dropped; Reporter asks the Court to repeat.)

16 THE COURT: So as I alluded to earlier, this case  
17 will not be tried any time soon and, as you can appreciate,  
18 jury trials have been backed up as a result of the pandemic  
19 and we only recently started doing criminal jury trials a  
20 couple of weeks ago in April. So you will not see a trial  
21 until 2022 if you want a jury trial and I think even summer of  
22 2022 might be ambitious. Because even though we might be able  
23 to do more than the number of trials we are doing now, which  
24 is two at a time, we cannot be expected to constantly be  
25 picking juries and so things will not fully open up again for

1 a while.

2 So I guess I ask the parties to consider whether or  
3 not a bench trial -- if you will consider a bench trial,  
4 especially because the issues had been narrowed so much by the  
5 summary judgment decision and by the default of AMA. So you  
6 do not need to answer now, but I would give it some thought,  
7 depending on your interest in getting this case resolved  
8 sooner rather than sometime next year and probably late next  
9 year.

10 MR. LESSER: Your Honor, if I may?

11 What would be your best guesstimate today, if we did  
12 a bench trial, when you think it could be slotted in or at  
13 least to commence?

14 THE COURT: I have no idea.

15 I can tell you this, that right now at the rate of  
16 two trials every two weeks, which is the jury selection  
17 period, we have criminal trials scheduled from now until the  
18 end of 2021, and so that means no civil trials will be  
19 happening. Now, it is possible that we will have the  
20 potential to pick some civil juries between now and the end of  
21 the year. But again, because we cannot run a nonstop jury  
22 selection process, it is just not possible even under the best  
23 of times; I do not think we are going to be doing many civil  
24 jury trials this year, if any. So then you are talking about  
25 the backlog of civil trials, of which there are many, many.

1 And so I would think maybe late next year would be a safe  
2 estimate. Sometime fall or later in 2022 would be the  
3 earliest I would expect we would be able to try this case.  
4 Now, the age of the case contributes -- might bump us up a  
5 little bit, but probably not much.

6 MR. LESSER: I may not have been clear.

7 My question to you was if we decided to do a bench  
8 trial, what would be your best guesstimate today as to when  
9 you think it could be slotted?

10 THE COURT: My apologies. That was a very long,  
11 unnecessary explanation.

12 We could probably slot it any time before the fall.  
13 My deputy is on the call. We could do it in the summer. It  
14 is only going to be a week, roughly. And faster if we are not  
15 picking a jury; we could get it done, I bet, in five days. So  
16 any time in the summer.

17 MR. LESSER: Okay. That will be something that I  
18 would like to confer with my client and obviously with  
19 Mr. Kazan and we'll definitely consider that. That's a big  
20 swing in terms of timing and there is a lot of prejudgment  
21 interest that's attached, so maybe it does make sense to do  
22 that. So we'll confer on that issue.

23 THE COURT: Yes. Okay. I mean, we could do it as  
24 early as June. July, less likely, but August as well are  
25 open. Right now I think August is wide open.

1 MR. LESSER: Okay.

2 THE COURT: But we could do June 5th, I was just  
3 told, if you guys want to start that early. It is up to you.

4 MR. LESSER: Thank you. We will confer on that for  
5 sure.

6 THE COURT: But there is some motion briefing,  
7 obviously, that would have to happen first and so I would  
8 suggest August, to be more realistic, so you could get all  
9 your briefing done and line up all your witnesses and get  
10 ready, you know, appropriately.

11 Okay. So moving on then. Let's talk about the  
12 witnesses that each of you have identified. Neither side  
13 explained what these witnesses would testify about, which are  
14 required typically. However, I imagine that if neither side  
15 was handicapped by that, because it seems to me you both know,  
16 I gather, who these different witnesses are and what they may  
17 be testifying about. But I do wonder if either side has an  
18 objection to any of these witnesses testifying. And I note  
19 that the defense does suggest a challenge to the plaintiff's  
20 expert, I believe, which is something that would have to be  
21 briefed before trial to be sure, and it is not going to happen  
22 in the middle of trial.

23 So any of objections to either side's witnesses?

24 MR. LESSER: None for the plaintiff. I mean,  
25 obviously to the extent that there is going to be a challenge

1 to the plaintiff's expert, it will be concomitant to whatever  
2 that challenge is, but my witness list is relatively discrete  
3 to adverse witnesses and the plaintiff's expert, as well as  
4 the 30(b)(6) designee.

5 THE COURT: Okay. How about you, Mr. Kazan? Do you  
6 have any objection to the plaintiff's witnesses?

7 MR. KAZAN: No, Your Honor. I think what happened  
8 was the -- I think it's under the motions in limine that  
9 Mr. Lesser and I both sort of parroted each other's language  
10 as a sort of a precautionary issue, but I believe we're both  
11 familiar with all of these individuals who may testify at  
12 trial. I don't foresee a Daubert type exclusion in  
13 challenging Mr. Lazzara.

14 THE COURT: Okay. Now let me ask you, Mr. Lesser,  
15 because in your -- well, as Mr. Kazan just said, both of you  
16 have parallel language, apparently you parroted each other,  
17 suggesting you might challenge the other side's expert, but  
18 you are saying you are not going to do that, right?

19 MR. LESSER: Yes. Like Mr. Kazan, I don't expect a  
20 Daubert style challenge to Mr. Ashe based upon, you know, his  
21 credential.

22 THE COURT: Okay. All right. So rather you are  
23 just going to challenge the bases of his opinion as argument  
24 to the jury or whoever the fact finder is?

25 MR. LESSER: Or the foundation, the evidentiary

1 foundation to the opinions that he proffers.

2 THE COURT: Okay. All right. Now let's turn then  
3 to the deposition testimony.

4 The plaintiff has identified quite a bit of  
5 deposition testimony it may seek to offer at trial. And the  
6 normal -- the way I have these designations dealt with,  
7 because I want to do it before trial, especially if we are  
8 having a jury trial because I want to avoid any battles in the  
9 midst of trial, is to have -- whichever side wants to use the  
10 testimony in the first instance, basically produce a copy of  
11 the deposition transcript and color code those portions that  
12 the plaintiff wants to use; and then the defense, or the  
13 opposing party, if it is the defense wants to use it, color  
14 code it in another shade, like a highlighter, as  
15 cross-designations. So obviously, as often happens, is the  
16 plaintiff will designate certain lines and then the defense  
17 will take the view that other lines or portions should be  
18 introduced for completeness or to avoid any confusion or  
19 misleading testimony being admitted. So whoever the moving  
20 party is has to produce a copy of the deposition transcript  
21 with a highlighted -- with the designations it wants  
22 highlighted in one color and then the defense will highlight  
23 in another color what it proposes to introduce, if the  
24 plaintiff gets to introduce their portions, and then any  
25 objections should also be noted. Now, the mechanics of that I



1 leave to you, but you could probably number them somehow and  
2 then recite what the objections of the arguments are on a  
3 separate document, because I do not think it will necessarily  
4 lend itself to doing so in the document. But at the end of  
5 the day, what I want is the deposition transcripts color coded  
6 with each side's designations and then some recitation of what  
7 the objections are to the other side's designations, so some  
8 brief articulation of it so that they can be addressed in a  
9 pretrial conference.

10 And I think this goes to some of the -- I think this  
11 goes to Holmes's section of the joint pretrial order about  
12 deposition designations. Because there is no specific  
13 designations in your section, Mr. Kazan, but it sounds like  
14 you may want to cross-designate portions and I want you to do  
15 that in the actual document that I mentioned and I want it to  
16 be done before trial so I could resolve any disputes before we  
17 actually start trial. Okay?

18 Any objection about that process?

19 Okay.

20 MR. LESSER: The only thing I would raise is that  
21 with respect -- presumably with respect to the plaintiff's  
22 burden of proof on its case in chief, that's relatively  
23 straightforward; I color/highlight the case-in-chief stuff  
24 that I want in and Mr. Kazan will add or raise his objections.  
25 With respect to affirmative defenses where the burden is

1 shifted, how would you propose addressing that? Would it be  
2 the same thing where I just color code and he color codes and  
3 we kind of work that through?

4 THE COURT: Yes.

5 MR. LESSER: Okay.

6 THE COURT: But I assume that Mr. Kazan would start  
7 that process if, in fact, he is going to be eliciting certain  
8 evidence in the deposition testimony that he wants to  
9 introduce.

10 MR. LESSER: Right.

11 THE COURT: So, Mr. Kazan, if there is certain  
12 evidence that you want to elicit via deposition testimony or  
13 present via deposition testimony in support of your  
14 affirmative defenses, you should start that process, the  
15 designation process, with whatever transcripts you want to use  
16 and then Mr. Lesser can cross-designate. Okay? So whoever  
17 has the burden, start -- whoever wants to affirmatively use  
18 the evidence should start the deposition designation process.

19 But I just want to disabuse you guys of the notion  
20 that you can wait until the final pretrial conference to do  
21 that. We are going to get that done and resolved by the time  
22 of the final pretrial conference, which is going to be just a  
23 half a week before trial starts.

24 MR. LESSER: Understood.

25 MR. KAZAN: Understood, Your Honor.

1           May I ask a question on this point? Because the  
2     designations that are there are certainly of every witness who  
3     plans to be available in that trial. And so the question  
4     would be, if we are doing designations, assuming it is not a  
5     bench trial, is the custom in your court to read the  
6     designations to the jury, provide them -- or just provide it  
7     to them in writing?

8           THE COURT: You know, I let the parties decide how  
9     they want to present it.

10          So, I have had both done. Predominantly, it seems  
11     like parties have it read. So someone sits in the witness  
12     box, reads back the answers to a lawyer who reads the  
13     questions by the lawyer. So you can choose whatever format  
14     you like. Sometimes I think parties like to make sure the  
15     jury hears it. You know what I mean? Because you never know  
16     if they read it if you just submit it to them in writing. So  
17     that is why I think most parties -- and I understand this. I  
18     have done the same. I would probably have it read in as if  
19     the person were testifying. Okay.

20          MR. KAZAN: Thank you, Your Honor.

21          THE COURT: And obviously the same rules will apply.  
22     You know, you cannot have your mock witness inflect in a  
23     certain way. And I have done extensive readings like that in  
24     trials. So you just have to maintain a relatively even tone,  
25     whoever the witness is, so as not to affect the impact of the

1 testimony unfairly. All right?

2 But if you want to submit it in writing and you are  
3 satisfied to do it that way just because you want to refer to  
4 it during closing argument and you just want it to be there,  
5 that is fine, too. So I am not going to prescribe how you do  
6 that. That is up to you.

7 MR. KAZAN: Thank you, Your Honor.

8 THE COURT: Okay. All right. Now turning to the  
9 exhibits, which start on page 18.

10 First of all, plaintiff's exhibits, the defense has  
11 at least listed a lot of objections to a number of plaintiff's  
12 exhibits, certainly in the first 17 or so. And then the same  
13 is true with respect to Defendant Holmes's exhibits, plaintiff  
14 has raised some objections as well. What I would like you  
15 folks to do is to put those objections that will require some,  
16 you know, briefing into a motion in limine. So I am not going  
17 to deal with these, especially if we are in a jury trial, on  
18 the fly or as the exhibit is being offered.

19 So I note some of these are really prejudice and  
20 relevance objections, but I want you to explain or summarize  
21 this, even by category, what your objections are to certain  
22 exhibits being proffered by the other side. It would probably  
23 behoove you to talk to each other to make sure that the  
24 exhibit that you are objecting to is actually going to be  
25 offered as opposed to it was marked, you know, out of caution.

1 And then as part of your motions in limine, I would like you  
2 to brief your argument about why an exhibit should be  
3 precluded entirely or if you want a cautionary instruction to  
4 be given, whatever it is that you want to argue. If you do  
5 not, I will probably be less likely to grant some preclusion  
6 because I do not want to deal with it in the middle of a trial  
7 without having the time to think about it.

8 Now, obviously objections to, you know, questions  
9 asked to witnesses or how a document is characterized, you can  
10 make those, of course, during the trial itself. But it seems  
11 to me many of these, for example, decisions from other cases  
12 or declarations offered in other cases should be amenable to a  
13 written motion in terms of preclusion, so I would like you to  
14 do that in advance of trial.

15 MR. LESSER: Understood.

16 THE COURT: Okay?

17 So that applies to both sides.

18 And you can put them together if you would like  
19 because it seems to me some of these are similar kinds of  
20 exhibits, especially the decisions from what appear to be  
21 other cases. You can argue sort of as to exhibits, for  
22 example, 13 through 16 that the plaintiff seeks to offer the  
23 following argument to preclude them.

24 All right. And then we get to the motions in limine  
25 section. Neither side identified any, but obviously I have

1 given you a number of --

2 MR. KAZAN: Your Honor?

3 THE COURT: Yes.

4 MR. KAZAN: I'm so sorry to interrupt.

5 THE COURT: It's okay.

6 MR. KAZAN: We did identify one that we had not  
7 discussed with -- well, it was in our -- it's in the pretrial  
8 order, we have not fully discussed it, which is, there are  
9 numerous references in various pleadings to the fact as to who  
10 Mr. Holmes sold his house to that Mr. Lesser raised. And so  
11 that is one issue that, you know, we flagged as not being  
12 appropriate for a preclusion order in advance. I don't know  
13 if Mr. Lesser intended to actually raise it at trial, but it  
14 is something that's contained in several of the documents that  
15 he has listed as exhibits.

16 THE COURT: Mr. Lesser, do you intend to elicit this  
17 information or present some evidence on whom Mr. Holmes sold  
18 his prior residence to?

19 MR. LESSER: The answer to that was no, it's not  
20 actually in any of the exhibits. To the extent that, you  
21 know, that there was some news report articles, we're not  
22 going to offer those per se. To the extent that we offer  
23 evidence of Mr. Holmes' bank statements and things like that,  
24 I don't think they reflect the sale. My understanding, at  
25 least from the recording, was that he set up some sort of LLC

1 for the purchase, but we didn't really get into that. So I  
2 wasn't offering those articles into evidence, but I'll confer  
3 with Mr. Kazan as to what his concerns are and try to work  
4 that through by stipulation.

5 THE COURT: Okay. If you can do that, great.

6 If not, obviously move, Mr. Kazan, for whatever  
7 motion in limine you think -- whatever limiting instruction  
8 you want on that or preclusion if Mr. Lesser indicates that he  
9 wants to talk about that subject.

10 Now, I have mentioned already that a number of areas  
11 have to be covered in motions in limine, so I am not going to  
12 reiterate those.

13 Is there anything else that you can think of now,  
14 given my general guidelines on how I like to proceed mainly  
15 to, you know, resolve as many issues as we can before we start  
16 trial, that you think should go into a motion in limine?

17 MR. LESSER: None for the plaintiff.

18 I would just say that I'd like to -- you know, we'll  
19 still confer, continue to confer. Maybe we can even get some  
20 more stipulations of fact to streamline further what's going  
21 to be presented to the jury and the specific questions we're  
22 going to have them deal with in the proposed special verdict  
23 sheet. And I'll start that process so that we can try to  
24 streamline this as much as possible.

25 THE COURT: Okay. So I guess here is a question.

1 And I know this requires you to maybe try to figure out what  
2 is in each other's minds, but if you think there is some  
3 chance that this could be -- that both sides will agree to a  
4 bench trial, we could try to set a schedule for all the  
5 briefing of the motions.

6 If you think it is more likely that we are going to  
7 have a jury trial, I am trying to figure out how best to  
8 handle this. Because I can give you a trial date in 2022, I  
9 just do not know -- and we can work backwards in terms of the  
10 briefing schedule. I just do not know how realistic even that  
11 exercise is. I would probably set it for the summer of 2022,  
12 in an optimistic sort of vein.

13 But do you have any thoughts I guess on basically  
14 whether you think you will agree on a bench trial or not?

15 MR. KAZAN: Your Honor, for the plaintiff -- sorry.  
16 For the defendant, Mr. Holmes, I would suggest that it's  
17 unlikely. I do believe he is going to want to have a jury  
18 hear his case.

19 THE COURT: All right. That perhaps then answers  
20 the question. Why don't we set a date for summer of 2022.  
21 And who knows, I mean, it is impossible to predict how the  
22 circumstances surrounding us will change and what that means  
23 for the court and its processes, so let's just put it down for  
24 sometime maybe June or July in 2022, about a year from now.

25 Does anyone have any notion that they will be



1 unavailable in either of those months next year?

2 MR. LESSER: Yes, the only blackout that I'm going  
3 to have is going to be towards -- it's going to be surrounding  
4 when my kids are done with school because we were supposed to  
5 take a trip for their bar- and bat mitzvah last year, but then  
6 COVID. And so we were going to go this year, but now with the  
7 fighting that's happening, that's not happening. So I would  
8 be hesitant to do it in the beginning part of June. I would  
9 suggest July only if we're looking at the summer, this way I  
10 don't have to come to you and say, Your Honor, I need to  
11 adjust it further. So I would say mid-July if we're going to  
12 be looking at the summer of 2022. Obviously, if we can move  
13 it up, that would be great.

14 THE COURT: Okay.

15 MR. KAZAN: And, Your Honor, similarly, my two  
16 children will now be graduating at the same time from college  
17 hopefully in June of next year, so.

18 THE COURT: Congratulations.

19 MR. KAZAN: Well, one will be celebrating their  
20 graduation and the other will have their graduation.

21 THE COURT: Okay. Yes, I know, the whole world is  
22 topsy-turvey.

23 So how about July 11th as at least our scheduled  
24 trial date, and that way at least we can generate some  
25 briefing dates based on that.

1 July 11, 2022 to pick the jury and start the trial.

2 In terms of motions in limine, since there are quite  
3 a few, why don't we have those briefed six weeks before trial.

4 So, Fida, what date is that?

5 THE CLERK: June 30th.

6 THE COURT: June 30th?

7 THE CLERK: May 30th.

8 THE COURT: May 30th. May 30th, that makes sense.

9 Do you know if that is Memorial Day?

10 MR. KAZAN: That is Memorial Day.

11 THE COURT: Ah. So let's make it before then  
12 because it is still a lot of time. So why don't we make it  
13 the week before then, May 23rd. So that will be the date.

14 Is that all right?

15 MR. KAZAN: Actually, I may have spoken too quickly.  
16 I saw that it was the last Monday in May and I assumed that  
17 was Memorial Day, but I think that's right.

18 Ms. Aberle is nodding her head.

19 MR. LESSER: Yeah, May 30, 2022 is Memorial Day.

20 THE COURT: Okay. So let's make it May 23. And why  
21 don't we make that kind of an omnibus due date so you only  
22 have one deadline. So that is for the motions in limine as  
23 well as the deposition designations.

24 And then each side will have two weeks to respond to  
25 the motions in limine, which would put us in June, I think

1 June 6th or 7th.

2 Is that right, Fida, from May 23rd?

3 THE CLERK: Yes, June 6th.

4 THE COURT: Okay. So June 6th it will be due.

5 And then one week if you want to reply, but you do  
6 not have to. And that will be June 13th.

7 And then why don't we make the 13th the date upon  
8 which the proposed jury charges should be submitted.

9 And we will put out on the -- well, actually, let me  
10 say this. You do not have to provide any sort of standard  
11 instructions like burden of proof or credibility or the whole  
12 process by which the jury has to deliberate, et cetera. Just  
13 focus on the claims, obviously the 273-a and the 276 claims,  
14 and what those elements are and what the jury needs to find in  
15 terms of the elements and then of course the alter ego and  
16 then anything else you think that relates to the claims in  
17 this case.

18 And the way I would like you to do that, too, is to  
19 produce a joint submission. So to the extent that you agree  
20 on any instructions, just have that set forth. And then if  
21 you disagree, indicate defense's position, plaintiff's  
22 position, sort of stacked, so that way we have one document  
23 that we can use, that my law clerk can use to produce the  
24 final instructions.

25 And then we will ask you to send that to us in Word

1 format also to our Chen chambers e-mail so that obviously we  
2 could work off of that document in generating or at least cut  
3 and paste as appropriate from it.

4 Let's see. Proposed voir dire, you can submit those  
5 two weeks before trial.

6 So what would that be, Fida?

7 And all these dates will be generated again in the  
8 minute order.

9 MR. LESSER: Your Honor, if I may?

10 I was just looking at the calendar and I just --  
11 what I don't want to do is, I don't want to be in a situation  
12 where I have to come to you and ask for an adjustment. And  
13 just looking at July 11th and when this trip which isn't yet  
14 planned but is supposed to be planned, I don't want to be in  
15 a -- get in trouble with -- in that.

16 THE COURT: That is fine.

17 MR. LESSER: If we can just make it July 18th,  
18 Judge, then I know I'm clear because I know it's not going to  
19 extend that far.

20 THE COURT: Okay. So we will make the trial date  
21 July 18th.

22 MR. LESSER: Thank you.

23 THE COURT: Assuming, Fida, we do not have nothing  
24 else on that date, for 2020.

25 MR. LESSER: And we can keep all of the other dates

1 because I would like to get it all done before that trip. So  
2 we don't need to, you know, push back those deadlines. You  
3 know, we can keep the dates that you suggested for the  
4 pretrial submissions.

5 THE COURT: Mr. Kazan, are you fine with that?

6 MR. KAZAN: I am, Your Honor.

7 THE COURT: Okay. So all the dates that we have  
8 just discussed will stay the same. The trial date will move  
9 to July 18th. And then two weeks before that, which should be  
10 July 4th --

11 THE CLERK: June 27th.

12 THE COURT: Thank you.

13 We will make it June 27th. That will be the date on  
14 which you submit your proposed voir dire and also a list of  
15 names and terms that could be referenced during the trial so  
16 that we could provide it to the court reporters. So basically  
17 you are looking for unique spellings or unusual spellings.

18 And also just remember in your proposed voir dire to  
19 include the names of everyone who might be referenced during  
20 the trial, or places if that is relevant at all, so that we  
21 can make sure that we have jurors -- that you pick jurors who,  
22 you know, do not have unique familiarity with either people or  
23 places that are relevant to the trial.

24 Fida, I think I have covered everything, right?

25 The one other thing --

1 THE CLERK: I think --

2 THE COURT: Oh, sorry.

3 The one other thing I will say is that we will post  
4 my standard, what I call, peremptory challenge questions.  
5 Things like: Are you married or do you have a partner? What  
6 do you do for a living? Where do you live? You know, county  
7 and borough. That sort of stuff we will put online so you do  
8 not need to -- when I say online, we will docket it so that  
9 you will see what my standard questions are, including some  
10 cause questions that are standard. So you do not have to  
11 re-suggest those. You should probably focus on questions that  
12 are unique to this case.

13 Okay. Fida, you were going to say something?

14 THE CLERK: Just that I think that covers  
15 everything.

16 THE COURT: Oh, okay.

17 So I think we are good.

18 Anything else from you, Mr. Lesser?

19 MR. LESSER: No, Your Honor. Thank you.

20 THE COURT: Okay. And you, Mr. Kazan?

21 MR. KAZAN: Do we have a where the trial will be  
22 relative to Central Islip or Brooklyn?

23 THE COURT: Oh. Are you guys in Central Islip? I  
24 know the case was originally filed there and, unfortunately  
25 for you, either it got transferred to me or got assigned to me

1 from the beginning because we are sharing the workload of the  
2 Central Islip courthouse.

3 Let me look at your addresses.

4 Well, Mr. Lesser is on Lexington Avenue.

5 You are both in --

6 MR. LESSER: Yeah. The counsel are all in the City.  
7 The only reason that it was -- and the underlying cases were  
8 in Islip because that's AMA -- AMA's location was out in  
9 Long Island.

10 MR. KAZAN: Yeah. Half the witnesses are on the  
11 Island and half the witnesses are not on the Island, so.

12 THE COURT: It is going to be in Brooklyn. So  
13 hopefully they do not mind, but I think the majority of us can  
14 get to Brooklyn relatively easily.

15 The last thing I should mention to you; if the case  
16 is going to settle, you should settle it before the Thursday  
17 before the trial or else you are going to have to pay the jury  
18 fee, which for civil cases I think runs about -- what was it,  
19 Fida, 1800 or something like that?

20

21 THE CLERK: I believe it's \$50 per juror. So it's  
22 60 jurors times \$50 divided by two.

23 THE COURT: Okay. Which is about \$1500 a party.

24 So keep that in mind. If you are going to settle  
25 it, settle it before the Thursday before trial starts.

1 MR. KAZAN: Thank you, Judge.

2 MR. LESSER: Thank you, Judge.

3 THE COURT: You obviously have at least a year to  
4 figure that out.

5 All right. If you folks decide -- if you change  
6 your mind about jury trial, you will let me know.

7 If, for example, Mr. Kazan, you talk to Mr. Holmes  
8 and he decides he wants to get the case done this summer, we  
9 are available for that. Okay?

10 MR. KAZAN: Understood, Your Honor.

11 THE COURT: All right. So thank you, everyone.  
12 That concludes this proceeding.

13 Stay safe and have a good summer. We will hear from  
14 you I guess in about a year or so from now.

15 MR. LESSER: Thank you so much, Your Honor. And you  
16 too and to your court staff, stay safe and best regards.

17 THE COURT: Thanks, everybody.

18 MR. KAZAN: Thank you, Your Honor.

19 (Matter concluded.)

20 \* \* \* \* \*

21 I certify that the foregoing is a correct transcript from the  
22 record of proceedings in the above-entitled matter.

23 /s/ Andronikh M. Barna

August 17, 2022

24 \_\_\_\_\_  
ANDRONIKH M. BARNA

\_\_\_\_\_  
DATE

25